No.....

SUPREME COURT OF THE UNITED STATES

F. H. VAHLSING, Petitioner

V.

F. O. HARRELL, Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now F. H. Vahlsing, petitioner, a resident of the State of New York, complaining of the respondent, F. O. Harrell, a resident of the State of Texas, and files this his petition for writ of certiorari, to review and correct the judgment and decision of the United States Court of Appeals for the Fifth Circuit in cause No. 12,827 on the docket of said court, styled F. H. Vahlsing v. F. O. Harrell, as follows:

STATEMENT OF THE MATTER INVOLVED

Petitioner and respondent were plaintiff and defendant, respectively, in a declaratory judgment suit instituted and tried in the United States District Court for the Southern District of Texas. The suit sought a construction and declaration of the rights of petitioner under an exchange of letters which petitioner claimed had the legal effect of creating an easement over lands of the respondent, and under which easement petitioner claimed certain permissive rights from the owner of the dominant tenement. The District Court judgment was for respondent, and petitioner duly prosecuted his appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the lower court. The opinion of the Court of Appeals is found in 178 Fed. (2nd) 622, and correctly states the facts but reaches a wrong conclusion of law.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under the provisions of 28 USCA Sec. 347(a). The judgment of such Court of Appeals, here sought to be reviewed, was rendered on December 21, 1949 (Rec. p. 245). A petition for rehearing, duly filed, was denied on January 24, 1950 (Rec. p. 256).

QUESTION PRESENTED

The Court of Appeals erroneously held that the exchange of letters between Raymond C. Gee, Vice Presi-

dent of the Fort Worth National Company (Rec. p. 38) and A. W. Amthor, Manager and Engineer of the La Feria Water Control and Improvement District (Rec. pp. 38-43) constituted a grant of an easement for drainage purposes only, since no other purpose than drainage was mentioned, and that the easement grant should be confined to its terms. The easement purpose, i.e. drainage, is general rather than specific as to the extent of the burden to be imposed on the servient tenement. Petitioner, with the express consent of the owner of the dominant tenement, such consent having been obtained for a valuable consideration, maintained and used a suction pipe under the surface of the described right-of-way for the purpose of obtaining irrigation water from the drainage ditch in the center of the right-of-way, for a period of approximately ten years from the date of the exchange of letters, with the consent and acquiescence of the owner of the servient tenement, respondents predecessor in title. Petitioner presents the question and proposition that where a grant of an easement is general as to the extent of the burden to be imposed upon the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed, and that by reason of such rule of law the Court of Appeals should have declared the petitioner's legal right, with the consent of the owner of the dominant tenement, to have and use the suction pipe in the particular manner and course as it has been used in the past. The Court of Appeals, in holding that the easement did not comprehend the right to have and use such suction pipe, applied the rule of construction that is applicable only to grants of ease-

ments which are specific as to the particular course or manner of enjoyment. Petitioner's brief, filed in support hereof, fully demonstrates the error of the Court of Appeals in affirming the judgment of the trial court.

REASONS RELIED ON FOR GRANTING WRIT

The Court of Appeals has rendered a decision in this cause on an important question of general law which is untenable and in conflict with the weight of authority. This Honorable Court should intervene to resolve and settle the important principle of law, heretofore so apparently settled by the reported cases, but completely overruled by the United States Court of Appeals for the Fifth Circuit, to the effect that an easement grant which is specific as to the course or manner of its enjoyment will be construed and given legal effect according to its terms as written, but that an easement in general terms, which does not purport to specifically set out the course and manner of enjoyment, will be construed and given legal effect in the light of the interpretation which the parties to the easement have themselves given it, as shown by their acquiescence and consent to a use in a fixed course and manner over a long period of years, and that such use so acquiesced in shall fix and limit the right to that particular course or manner of enjoyment.

WHEREFORE, Petitioner, F. H. Vahlsing, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, and that after due hearing the judgment of such Court of Appeals be reversed and judgment here rendered declaring petitioner to have the legal rights as claimed by him, to-wit: to have and maintain the suction

pipe involved as located, and to use same for the removal of water from the drain ditch involved, as long as he has the consent of the Water District involved; petitioner further prays that he have all other relief to which he may appear entitled, including all costs of suit.

Respectfully submitted,

EMMETT J. RAHM
812 Majestic Building
San Antonio 5, Texas

RONALD SMALLWOOD
2118 Alamo National Bldg.
San Antonio 5, Texas

ATTORNEYS FOR PETITIONER,
F. H. Vahlsing.

Office - Supreme C
FILE
JUN 22 1
CHARLES ELMORE

Supreme Court of the United States

JUNE TERM, 1950

No. [redacted] 65

F. H. VAHLSING, *Petitioner*

v.

F. O. HARRELL, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KARL M. GIBBON,
Counsel for Respondent.

ORRIN W. JOHNSON
Of Counsel.

Firm Foundation Print—Austin

INDEX

Page

Statement of the Case 2

POINT I.—The Court of Appeals properly affirmed the adjudication on the merits 2

POINT II.—The Petition for a Writ of Certiorari Should be Denied 8

Table of Cases Cited:

Winslow v. City of Vallejo, 148 Cal. 723, 84 p. 191, 5 L.R.A. N.S. 851, 113 Am. St. Rep. 349 (1906) 5

City of Lynchburg v. Smith, 166 Va. 364, 186 S.E. 51 (1936) 5

Kesseler v. Bowditch, 223 Mass. 265, 111 N.E. 887 (1916) 5

Tyler v. Davis, 61 Tex. 674 (1884) 8

Juneman v. Franklin, 67 Tex. 411, 3 S.W. 562 (1887) 8

Fowler v. Simpson, 79 Tex. 611, 15 S.W. 682 (1891) 8

Lorino v. Crawford Packing Company, 142 Tex. 51, 175 S.W. (2d) 410, 415 (1943); 27 Tex. Jur. 71; 51 C.J.S. 925 8